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NO.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ARCWEL CORPORATION,
Petitioner,

versus

SOUTHWEST MARINE, INC. and
SAN DIEGO UNIFIED PORT DISTRICT,
Respondents.

PETITION FOR WRIT OF CERTIORARI

MICHAEL J. RADFORD
PROCOPIO, CORY, HARGREAVES
AND SAVITCH
530 B Street, Suite 1900
San Diego, California 92101
Telephone: (619) 238-1900
Counsel of Record for
Petitioner Arcwel Corporation

QUESTIONS PRESENTED

Whether federal maritime law or state law should be applied to determine the validity of a clause in a contract which limits tort liability for the negligence of an operator of a land-based stationary dry dock?

Whether enforcement of such an exculpatory clause in a contract for the use of a Navy-owned and quasi-public dry dock is barred by public policy.

LIST OF PARTIES

The parties to the proceedings below were Arcwel Corporation, Southwest Marine, Inc., the San Diego Unified Port District, and Sipco Marine, Inc.

The parties before this Court are petitioner, Arcwel Corporation,[1/] and Respondents Southwest Marine, Inc. and the San Diego Unified Port District.

1/ In its earlier pleadings, Petitioner listed Superior Crane and Rigging, Inc. as an affiliate pursuant to Supreme Court Rules, Rule 28.1. As of this date, Arcwel is no longer affiliated with Superior Crane and Rigging.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Arcwel Corporation,[2/] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on May 1, 1987, and finally decided by an order denying Petitioner's petition for rehearing on June 29, 1987.

2/ Arcwel Corporation was erroneously labeled "Arcwel Marine, Inc." in the opinion of the Ninth Circuit. This usage is not continued herein except in the opinion of the Ninth Circuit contained in Appendix A.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 816 F.2d 468, and reprinted in full at pages 1A-13A of Appendix A. The order denying the Petitioner's petition for rehearing is reprinted in Appendix A at pages 14A-15A.

The judgment and findings of fact and conclusions of law of the United States District Court for the Southern District of California (Infante, Magistrate) are also reprinted in Appendix A at pages 16A-36A.

JURISDICTION

Petitioner initiated the instant action against respondent by way of a third-party complaint which invoked the jurisdiction of the United States District Court for the Southern District of California under 42 U.S.C. §1332.

On April 15, 1986, the District Court entered a judgment in favor of petitioner and

against respondent Southwest Marine, Inc. See Appendix A, pages 16A.

Respondent appealed and, on May 1, 1987, the Ninth Circuit reversed the District Court's judgment. See Appendix A, pages 1A-13A. Petitioner's petition for rehearing was denied on June 29, 1987. Appendix A, pages 14A-15A.

On September 23, 1987, Justice O'Connor ordered that the time for filing this petition for writ of certiorari be extended to and including October 27, 1987. The jurisdiction of this Court to review the judgment and opinion of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. Factual History.

Petitioner Arcwel Corporation (hereinafter "Arcwel") and Respondent Southwest Marine, Inc. (hereinafter "Southwest") are competitors. Both companies are engaged in the business of building and repairing ships.

A great deal of the business of both companies is derived from United States Navy contracts.

In April 1982, the Navy solicited bids from San Diego ship builders to overhaul the U.S.S. Dubuque. The bid invitation described the work to be performed on the ship and provided prospective bidders with all pertinent information concerning the facility at which the work was required to be done (i.e., the 32nd Street Naval Dry Dock).[3/]

In 1982, the 32nd Street Naval Dry Dock was owned by the Navy and leased to the San Diego Unified Port District ("Port District"), a public corporation. One of the purposes of the lease was to make the facility available to ship repair contractors working on Navy ships. To accomplish this purpose, the Port District contracted with a

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3/ To aid prospective bidders in determining their fixed bids, the bid invitation included a description of the services, equipment, etc. available at the 32nd Street Naval Dry Dock and an estimate of the cost of dry dock services.

private entity to operate and maintain the 32nd Street facility for use by Navy contractors. The private entity responsible for operating and maintaining the dry dock was none other than Arcwel's competitor, Southwest.

Arcwel and Southwest bid against each other on a Navy contract to overhaul the U.S.S. Dubuque. Arcwel, as the low bidder, was awarded the contract on July 8, 1982. However, the work on the U.S.S. Dubuque was not scheduled to commence until October 1982.

In preparation for the commencement of work on the U.S.S. Dubuque, Arcwel signed an agreement for the use of the 32nd Street Naval Dry Dock with Southwest and the Port District. The "User's Agreement" -- the execution of which was required in order to secure the use of the dry dock specified in the Navy's contract -- incorporated a local dry dock tariff containing the following provisions:

6.2 Disclaimer of Warranty

Users should understand that the Dry Dock is made available on an "as is, where is" basis without warranty of any kind either expressed or implied. A User using the Dry Dock should make an independent inspection and may not rely upon any representation concerning the condition or state of repair of the Dry Dock or any part hereof including any promise to improve, alter, adopt or repair the Dry Dock or any part thereof unless such representation is made in writing by the District.

6.3 Indemnification

Users shall defend, indemnify, and hold harmless the District, the Government, and the Dry Dock Operator and Dockmaster and their respective officers, agents, and employees against causes of action, liability, damage and expense, including reasonable attorney's fees, for judicial relief of any kind, for damage to property of any kind whatsoever and to whomever belonging, including without limitation, user or its employees, or injury or death of any person or persons, including without limita-

tion, user or its employees, resulting directly or indirectly from the granting and performance of the User's Agreement or arising from the use and operation of the Dry Dock or any defect in any part thereof or services of the District, the Government, the Dry Dock Operator or the Dockmaster, or any of their respected officers, agents or employees.

Users shall be and remain liable for any and all claims, costs, expense and loss or liability arising from any act, omission, fault or negligence of its subcontractors, agents, employees, invitees and guests and shall defend, indemnify and save the District, the Government, the Dry Dock Operator and the Dockmaster, harmless against all such claims, costs, expense and loss or liability incurred in connection therewith, including attorney's fees, for injury to or death of persons or damage or loss of property.

User also agrees to release and hold the District, the Government, and the Dry Dock Operator and Dockmaster and their respective officers,

> agents and employees, harmless from any cost or loss including loss of property arising from disruption to or delay in User's contract work do to acts or omissions (including negligence) of the District, the Government, the Dry Dock Operator or Dockmaster in the operation of the Dry Dock so long as such parties have acted in good faith.

The U.S.S. Dubuque was docked for refurbishing on October 5, 1982. Unfortunately, during the period between bidding process and the actual repairs, the 32nd Street Naval Dry Dock had fallen into a state of disrepair. Southwest -- which, in its capacity as a user (rather than operator) of the dock, had just finished refitting the U.S.S. Okinawa -- left the dry dock dirty and in disrepair. The dock was in "deplorable condition" -- "cluttered with trash and litter" and clogged with sand from Southwest's sandblasting operation on the U.S.S. Okinawa. Appendix A, pages 23A-24A. Contrary to its obligations under

the User's Agreement,[4/] Southwest had not maintained the dry dock "so as to assure its full availability and usefulness at all times."

Before commencing repairs on the U.S.S. Dubuque, Arcwel was forced to clean and repair the dry dock. Furthermore, in order to perform the heavy repairs required by the Navy contract, it was necessary for Arcwel to rent several land-based cranes to replace the two malfunctioning gantry cranes which (according to the bid invitation) were supposed to be available at the dry dock. The land-based cranes leased by Arcwel were, by necessity, less efficient than the gantry cranes. The unavailability of the gantry cranes added to Arcwel's labor costs and adversely affected the work of Sipco Marine,

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4/ The Operation and Maintenance Agreement between the Port District and Southwest provided that Southwest would "maintain, protect and repair the dry dock in accordance with sound industrial practice and shall keep it in good working order and operating condition so as to assure its full availability and usefulness at all times."

Inc. (hereinafter "Sipco"), the subcontractor hired to do the sandblasting work on the U.S.S. Dubuque.

B. Procedural History.

On February 10, 1983, Sipco sued Arcwel for amounts allegedly owed under the sandblasting subcontract. As part of that suit, Sipco claimed that the unavailability of the gantry cranes caused inefficiencies, slowdowns and extra costs for the subcontracted work. Arcwel filed a third-party complaint against the Port District and Southwest alleging negligence, breach of contract under a third-party beneficiary, and indemnity -- all based on allegations that the gantry cranes were improperly repaired and maintained.

In defense, Southwest and the Port District asserted the exculpatory provisions of the local dry dock tariff precluded any recovery by Arcwel. This defense was asserted by Southwest and the Port District in two

summary judgment motions filed in December 1983. On February 3, 1984, the district court (Nielsen, J.) granted the Port District's motion for summary judgment as to all claims. Southwest's summary judgment motion was sustained as to the third-party beneficiary and indemnity counts.

On April 15, 1985, pursuant to stipulation, Arcwel's negligence claim was tried before United States Magistrate Edward Infante. After an eighty-day trial, the magistrate entered judgment in favor of Arcwel for $464,705.48, plus costs. In support of his judgment, Magistrate Infante found (1) Southwest owed a legal duty to Arcwel, as a user of the dry dock, to properly maintain and repair the gantry cranes in accordance with sound industrial practice, (2) Southwest violated this duty giving rise to a cause of action in tort, (3) a tort occurring on a stationary dry dock does not invoke admiralty law, (4) under California

law (which governed Arcwel's tort action for negligence), the exculpatory provisions incorporated in the User's Agreement were unconscionable and therefore unenforceable.

On appeal, Arcwel challenged the district court's summary judgment orders on the grounds, inter alia, that (1) the exculpatory clauses in the User Agreement were unenforceable and therefore could not support summary disposition of Arcwel's claims against the Port District, (2) a question of law existed as to whether Arcwel was an intended third-party beneficiary of the lease agreement between the Navy and the Port District, and (3) the Port District was liable, under general agency principles, for the negligence of Southwest.

In its cross appeal, Southwest argued that (1) California law was inapplicable to Arcwel's claims and, under federal maritime law, the exculpatory clauses in the User's Agreement were enforceable, and (2) even if

California was applicable, the magistrate erred in finding that the clauses were unconscionable.

On May 1, 1987, the Court of Appeals for the Ninth Circuit reversed Magistrate's Infante judgment against Southwest Marine and affirmed the district court's summary judgment orders. In rendering its decision, the Ninth Circuit side-stepped the conflicts of law issue:

> The choice of governing law in this case presents a close question . . . . There is a split of authority as to whether maritime law applies to such contracts. [Citation] Happily, we need not resolve this difficult issue because we reached the same conclusion under either body of law.
>
> * * * * * * * * *
>
> Whichever law applies, the clause shifting the risk of loss due to negligent maintenance to Arcwel is enforceable, shielding both Arcwel [sic] and Southwest from liability.

In analyzing California law, the Ninth Circuit reasoned as follows:

> California courts have generally upheld exculpatory provisions so long as they do not "affect the public interest." [Citation.] However, California courts have emphasized that the public interest exceptions should not be applied to invalidate exculpatory clauses entered into between commercial entities of equal bargaining power. There is "no reason" why one party, "having determined, as a matter of business judgment, at the price fixed justified assuming the risk of loss, should now be allowed to shift the risk so assumed to [the other party], which had neither agreed to assume it nor been compensated for such assumption." [Citations.]
>
> . . . Arcwel admits that, when it submitted its bid to the Navy, it was aware that it would be [sic] have to sign the User's Agreement and was familiar with the terms. Therefore, it had an opportunity to make its bargain based on the entire package offered by the Navy, including the allocation of various

> risks associated with the project. If the package as a whole was unacceptable, Arcwel could have declined to bid. Or, it could have increased its bid price to take into account the risk imposed by the exculpatory clause. We find the public interest not seriously implicated by this provision. [Footnote omitted.]

Under federal maritime law, the Ninth Circuit found that the exculpatory clause in this case "stands on even stronger footing." The appellate court noted that "'absent evidence of overreaching, clauses limiting liability in ship repair contracts will be enforced.' [Citations.]" The Ninth Circuit did not equate the Magistrate's findings of adhesion with the requirement of overreaching. The appellate court therefore found "no evidence overreaching" in this case.5/

5/ Based on its conclusion that the exculpatory clauses in the User's Agreement were valid, the Court of Appeals found that the district court's orders granting summary judgment to Southwest and the Port District "were correct."

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Ninth Circuit should be reviewed by this Court for several reasons: (1) This case involves a conflict of law between federal and state law which has not been, but should be, resolved by this Court, (2) the Ninth Circuit's decision conflicts with a decision of California's highest state court on a non-federal issue, (3) the Ninth Circuit's decision conflicts with previous decisions of this Court and (4) the Ninth Circuit's decision conflicts with the decisions of other circuits concerning competitive bidding in government contracts.

A. This Case Involves A Conflict of Law Between Federal And State Law Which Has Not Been, But Should Be, Resolved By This Court.

In its decision below, the Ninth Circuit has side-stepped an important issue concerning the choice of law in this case by concluding that it would reach the same result

under either federal or state law. As discussed more fully below, petitioner submits that there is a substantial difference between California law and federal maritime law concerning the enforceability of exculpatory clauses such as found in this case.

Petitioner submits that a split of authority has developed concerning whether federal or state law applies to negligence claims arising from the use and maintenance of a land-based naval support facilities. Under the criteria established by this Court in Executive Jet Aviation v. Cleveland (1972) 409 U.S. 249 and Foremost Ins. Co. v. Richardson (1982) 457 U.S. 668, the proper invocation of admiralty jurisdiction is dependent on a number of factors including (1) the locale of the allegedly tortious conduct, and (2) the nature of the activity which is the subject of the action. In applying this criteria to tort claims arising from the use of land-based naval support

facilities, various circuit courts have come to different conclusions.

As the Ninth Circuit noted in this case: "There is a split of authority as to whether maritime applies to [a contract for the use of a dry dock]." Clearly Arcwel's contract with the Navy is subject to maritime law, but its agreement with Southwest does not involve a "traditional maritime activity," and the application of maritime law in this case does not "serve the interests that lie behind the constitutional grant of admiralty jurisdiction." See Royal Ins. Co. of America v. Pier 39 Ltd. (9th Cir. 1984) 738 F.2d 1035, 1037.

The application of maritime law is not necessary to prevent Southwest, as operator of the dry dock, from being subject to claims leveled against it in distant foreign ports; nor is the invocation of admiralty jurisdiction warranted based on the desirability of a uniform approach to such contracts. Royal Ins. Co. of America v. Pier 39 Ltd.,

supra at 1038. As stated by one court: A contract for the maintenance of equipment on a land-based pier "is no more closely connected to maritime activity than would be similar services performed on some other fixed structure . . . ." Sea Land Industries, Inc. v General Shop Repair (D.C. Md. 1982) 530 F. Supp. 550, 560.

On the other hand, several courts have held contracts relating to the construction or maintenance of docks or wharves to be within the federal courts' admiralty jurisdiction. See Berwind-White Coal Mining Co. v. City of New York (2d Cir. 1943) 135 F.2d 443; Eastern Massachusetts Street Railway Co. v. Transmarine Corp. (1st Cir. 1930) 42 F.2d 58; and D.M. Picton & Co. v. Eastes (5th Cir. 1947) 160 F.2d 189 [cert. denied, 331 U.S. 859 (1947)]. Petitioner submits that these cases are distinguishable on the ground that the breach of the contracts in each case caused a tort which clearly fell within the

court's admiralty jurisdiction. Here, Southwest's negligence is governed by California law.

In any event, this issue has not yet been resolved by this Court. Resolution of the question is crucial to the determination of the claims in this case, as well as the claims of other litigants in pending and future litigation.

B. The Ninth Circuit's Decision Conflicts With A Decision of California's Highest State Court On A Non-federal Issue.

Furthermore, the Ninth Circuit's opinion (which concludes that the subject clause does not offend California law) is contrary to established precedent from the California courts.

Under California law, contract provisions which limit a party's liability for his own negligence are disfavored. A & M Produce v. FMC Corp. (1982) 135 Cal.App.3d 473. Where, as here, the exculpatory provision is required on a "take-it-or-leave-it" basis,

the contract will be carefully scrutinized. Id. In a situation where the party to be bound has no meaningful choice, California courts have refused to recognize such contractual limitations on liability. Tunkl v. Regents of the University of California (1963) 60 Cal.2d 92. If the exculpatory clause goes so far as to adversely affect a public interest, it will be held invalid. Id.

In Tunkl, the California Supreme Court held that an exculpatory clause should be invalidated if it involves the transactions that exhibit some, or all, of the following characteristics:

> It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpations is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public

> who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents. Id. at 98-101. (Footnote omitted.)

Magistrate Infante found the existence of each of these characteristics in this case. He concluded that the exculpatory

clause in the tariff was invalid under the Tunkl standard.

The Ninth Circuit's conclusion that Tunkl is distinguishable because "the public interest [is] not seriously implicated by [the exculpatory clauses in the User's Agreement]" is not supported by established California law. In Pelletier v. Alameda Yacht Harbor (1986) 188 Cal. App.3d 1551, a California court, applying the standards enunciated in Tunkl, recently concluded that a similar clause in a private mooring agreement was ineffective to relieve the harbor owner of liability for his negligence in connection with the sinking of the moored vessel during repairs. The court concluded that the "[mooring] transaction exhibit[ed] all six of the Tunkl characteristics." Id. at 1556; see also Gardner v. Downtown Porsche Audi (1986) 180 Cal. App.3d 713 [clause exculpating service station for negligence resulting in damage to automobile during repairs found to

be against public interest]; Salton Bay Marina, Inc. v. Imperial Irrigation Dist. (1985) 172 Cal. App.3d 914 [exculpatory clause in agreement which must, pursuant to county ordinance, be executed by landowner as a prerequisite to issuance of building permit is void as against public policy].

C. The Ninth Circuit's Decision Conflicts With Decisions In Other Circuits.

The Ninth Circuit's opinion also conflicts with established precedent aimed at preserving competition in the federal procurement and contracting process.

First, the opinion (which suggests that Arcwel should have declined to bid or, in the alternative, increased its bid price to take into account the risk imposed by the exculpatory clause) conflicts with federal procurement policies aimed at keeping the cost of government contracts down. The Ninth Circuit's decision is inconsistent, for example, with federal policies which encour-

age government contractors to disregard contingencies in a project which may increase the ultimate cost to the parties. See Foster Const. C.A. & Williams Bros. Co. v. United States (1970) 435 F.2d 873, 887. By eliminating the need to provide for such contingencies, the Government is able to secure the lowest possible bids from government contractors. Id. In most cases, the work is completed as anticipated at the agreed-upon price. In the event changed circumstances hamper the completion of the contract or substantially increase the cost to the contracting parties, an equitable adjustment procedure is available to compensate the government contractor for its additional expenditures. Id. The Ninth Circuit's decision in this case encourages the inflation of bids on government contracts. As such, it is contrary to sound federal procurement policy.

Second, the Ninth Circuit's decision condones the existence of an unfair competi-

tive advantage in the government contract bidding process. Congress has enacted a panoply of safeguards aimed at ensuring fair and open competition in federal procurements. See 10 U.S.C. §2304 and 41 U.S.C. §253 (Appendix B). These safeguards are scrupulously adhered to by the Government in order to secure a fair bargain for both parties. Id.; see also Federal Acquisition Regulation (FAR) section 1.101 et seq. (Appendix B).

In this case, Southwest's position as the operator of the 32nd Street Naval Dry Dock gave it an unfair advantage over its competitors in the Navy ship repair business. Southwest was privy to information about the condition of the dock which was unavailable during the bidding process. Furthermore, the evidence at trial established that Southwest's role as the operator of the 32nd Street Dry Dock placed it in a position to ensure that all of the cranes were functioning for its work on the U.S.S. Okinawa, but

inoperable when its competitor, Arcwel, was ready to commence repairs on the U.S.S. Dubuque.

The Ninth Circuit's opinion ignores the competitive advantage given to Southwest in this case, and penalizes Arcwel for circumstances beyond its control. In particular, the Ninth Circuit's decision is contrary to federal procurement policy aimed at eliminating the competitive advantage given to contractors like Southwest. This policy is embodied in FAR section 45.102 which states: "[I]f contractors possess Government property, [contracting] agencies shall . . . [e]liminate to the maximum practical extent any competitive advantage that might arise from using such property." (Appendix B).

Third, the Ninth Circuit's opinion (which assumes that Arcwel's bid on the U.S.S. Dubuque contract was based on an inspection of the dry dock and acceptance of the facility "as is") ignores a practical

consideration which is present in every government contract -- the amount of time between the bidding process and the actual performance of the bided work. This consideration has been recognized in connection with other public contracts requiring the use of government-furnished property. FAR Section 45.308, for example, permits enforcement of "as is" provisions in contracts for the use of government production and research facilities only so far as to disclaim damages for defects which existed at the time of the offer of inspection during the bid solicitation period. If there is any change in the condition of the government-owned facility between the solicitation period and the commencement of work, the contractor is afforded relief. FAR Section 52.245-19. (Appendix B).

D. The Ninth Circuit's Decision Conflicts With Decisions Of This Court.

Finally, the Ninth Circuit's decision conflicts with a prior precedent of this Court.

The seminal case in maritime law, which holds that a party may not contract against liability for its own negligence, is Bisso v. Inland Water Ways Corp. (1955) 349 U.S. 85. Although Bisso involved a release from liability provision in a contract between a tugboat and its tow, the case has been cited by many courts and the Federal Maritime Commission[6/] for the proposition that indemnity clauses in the tariffs of public dock facilities are void as a matter of law. See West Golf Maritime Association v. Galveston (1979) 1981 A.M.C. 938 and United States Lines, Inc. v. Maryland Port Administration (1980) 1981

5/ Decisions of the Federal Maritime Commission, as an agency with substantial expertise in this area, have been given great deference by the federal courts. Maryland Port Administration v. S.S. American Legend (D.Maryland 1978) 453 F.Supp. 584, 593

A.M.C. 952. Such an interpretation is consistent with the opinion of this Court. Justice Black, writing for the Court, stated:

> This rule is merely a particular application of the towage business of a general rule long used by courts and legislatures to prevent enforcement of release from negligence contracts in many relationships such as bailors and bailees, employers and employees, public service companies and their customers. 349 U.S. at 90-91.

In contrast, the Ninth Circuit has adopted the position that a contract for the use of a dry dock somehow differs from a towage agreement and therefore a clause limiting liability in connection with the use of a dry dock is enforceable "absent evidence of overreaching." Petitioner submits that review of the Ninth Circuit's decision in this case is necessary to avoid a misinterpretation of this Court's decision in Bisso.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

MICHAEL J. RADFORD
PROCOPIO, CORY, HARGREAVES
AND SAVITCH
Counsel of Record for
Petitioner Arcwel
Corporation

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARCWEL MARINE, INC.,	)	
	)	Nos. 86-5882;
Third-party Plaintiff/Appellee/Cross-Appellant,	)	86-5889
	)	D.C. No.
vs.	)	CV-83-0342-N(I)
	)	
SOUTHWEST MARINE, INC.,	)	OPINION
	)	
Third-party Defendant/Appellant/Cross-Appellee	)	
	)	
and	)	
SAN DIEGO UNIFIED PORT DISTRICT,	)	
	)	
Third-party Defendant/Cross-Appellee.	)	

Argued and Submitted
March 4, 1987 -- Pasadena, California

Filed May 1, 1987

Before: Thomas Tang, Arthur L. Alarcon and Alex Kozinski, Circuit Judges.

Opinion by Judge Kozinski

Appeal from the United States District Court for the Southern District of California
Leland C. Nielsen, District Judge, and
Edward A. Infante, Magistrate, Presiding

SUMMARY

Contracts

Appeal from magistrate's judgment and district Court's summary judgment orders. The magistrate's judgment is reversed; the district court's summary judgment orders are affirmed.

This action arises from appellee Arcwel Corporation's contract with the United States Navy to overhaul the U.S.S. Dubuque. Pursuant to that contract, Arcwel signed a User's Agreement with cross-appellee the San Diego Unified Port District (District) which included a clause exculpating the District or appellant Southwest Marine -- which maintained and repaired the dry dock -- for any losses arising from disruption, delay or negligence. Arcwel's subcontractor subsequently filed suit against Arcwel and Arcwel in turn filed a third-party action against the District and Southwest. The district

court granted summary judgment for the District as to all claims and for Southwest as to all but the negligence claim. A magistrate entered judgment against Southwest as to negligence, refusing to give effect to the exculpatory clause on the grounds of unconscionability.

[1] There is split authority as to whether maritime law applies to the User's Agreement -- a contract for the use of a dry dock. [2] California courts have generally upheld exculpatory provisions so long as they do not affect public interest. [3] Arcwel was aware when it submitted its bid that it would have to sign the User's Agreement and was familiar with its terms. It could have declined to bid, or increased its price to take into account the risk imposed by the exculpatory clause. Therefore, the public interest is not seriously implicated by the provision. [4] Under maritime law, absent evidence of overreaching, clauses limiting

liability in ship repair contracts will be enforced.

COUNSEL

Peter J. Ippolito, San Diego, California, for the appellee/cross-appellant.

C. Douglas Alford, San Diego, California, for the appellant/cross-appellee.

OPINION

KOZINSKI, Circuit Judge:

We consider whether an exculpatory clause in a contract for use of a dry dock, itself an integral part of a Navy procurement contract package, was unenforceable on grounds of unconscionability.

Facts

Arcwel Corporation ("Arcwel") was awarded a contract by the United States Navy to overhaul the U.S.S. Dubuque. The contract required that the overhaul be performed at a Navy-owned dry dock that was under lease to the San Diego Unified Port District ("Port District"). The dry dock lease obligated the

Port District to maintain the leased property and "keep it in good working order and operating condition so as to assure full availability and usefulness at all times." The Port district in turn entered into a contract with Southwest Marine, Inc. ("Southwest") for the maintenance and repair of the dry dock facility.

Pursuant to its contract with the Navy, Arcwel signed a User's Agrement with the Port District. The User's Agreement provided that Arcwel would indemnify and hold harmless the Port District and Southwest for any losses arising out of the docking or undocking of any vessel. The User's Agreement also incorporates a dry dock tariff, which contains a clause exculpating the Port District and Southwest for any loss arising from disruption, delay or negligence, "so long as [the] parties have acted in good faith." The tariff also provides that the dry dock is made available on an "as is, where is" basis,

"without warranty of any kind either express or implied."

The dry dock was equipped with two gantry cranes, the Wellman and the Myerstein. The lease listed one of these cranes as included in the leased property; a map attached to the lease showed both cranes; and the Tariff provided that the Myerstein and, at certain time, the Wellman were available for use.

Unfortunately, when Arcwel got down to the business of performing the overhaul it discovered that neither crane could be used effectively. The U.S.S. Dubuque was docked October 5, 1982. The Wellman did not become available until October 12 and even then did not function properly. The Myerstein was finally made available November 6. In the meantime, Arcwel had to rent land-based cranes as substitutes. Land-based cranes are less efficient than gantry cranes, adding to Arcwel's labor costs. The unavailability of the gantry cranes also adversely affected the

work of Sipco Marine, Inc. (Sipco), the subcontractor hired to do sandblasting work on the U.S.S. Dubuque.

Proceedings Below

Sipco sued Arcwel for amounts allegedly owed under the sandblasting subcontract. As part of that suit Sipco claimed that the unavailability of the gantry cranes caused inefficiencies, slowdowns and extra cost for the subcontracted work. Arcwel filed a third-party complaint against the Port District and Southwest alleging negligence, breach of contract under a third-party beneficiary theory, and indemnity, all based on allegations that the gantry cranes were improperly repair and maintained. The district court granted the Port District's motion for summary judgment as to all claims. In addition, the district court granted Southwest's summary judgment motion as to the third-party beneficiary and indemnity counts, leaving only the negligence claim pending.

The parties proceeded trial before a magistrate. The magistrate entered final judgment after trial in favor of Arcwel for $464,705.48 plus costs for the negligent failure to maintain the gantry cranes. He refused to give effect to the exculpatory clause in the User's Agreement on grounds of unconscionability.

Southwest appeals the magistrate's decision; Arcwel cross-appeals from the district court's summary judgment order.

Discussion

Southwest challenges the magistrate's ruling that the exculpatory clause was unconscionable and therefore unenforceable under California law. The magistrate based that conclusion on his finding that Southwest and the Port District were in a superior bargaining position and that Arcwel had no choice but to perform the work on the dry dock offered. Southwest argues that the magistrate should have applied maritime law, not California law, in interpreting the contract.

Southwest also claims that, whichever law applies, the clause should be enforced. The magistrate's factual findings are reviewed under the clearly erroneous standard, while his conclusion that the clause was unconscionable raises a question of law subject to de novo review. See Co-efficient Energy Systems v. CSL Industries, Inc. No. 86-5862, slip op. at 4 (9th Cir. March 11, 1987). The choice of law determination is also reviewed de novo. Phillips v. Amoco Trinidad Oil Co., 632 F.2d 82, 84 (9th Cir. 1980), cert. denied, 451 U.S. 920 (1981).

[1] The choice of governing law in this case presents a close question. The contract between the Navy and Arcwel is one for the repair of a vessel, traditionally subject to maritime law. See Kossick v. United Fruit Co., 365 U.S. 731, 735 (1961). On the other hand, the exculpatory clause is part of the User's Agreement between Arcwel and the Port District, a contract for the use of a dry dock. There is a split of authority as to

whether maritime law applies to such contracts. See, e.g., Royal Ins. Co. of America v. Pier 39, Ltd., 738 F.2d 1035, 1037-38 (9th Cir. 1984) (insurance policy on dry dock not within admiralty jurisdiction, citing cases on maintenance of docks).[1/] Happily, we need not resolve this difficult issue because we reach the same conclusion under either body of law.

1. California law

[2] California courts have generally upheld exculpatory provisions so long as they do not "affect the public interest." Tunkl v. Regents of the Univ. of Cal., 60 Cal.2d 92, 96, 32 Cal.Rptr. 33, 383 P.2d 441 (1963). However, California courts have emphasized that the public interest exception should not be applied to invalidate exculpatory clauses

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1/ We note that exercise of admiralty jurisdiction and the application of maritime law are not necessarily coextensive. The court may exercise diversity jurisdiction, as it did in this case, and still apply principles of maritime law. See, e.g., Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 628 (1959).

entered into between commercial entities of equal bargaining power. There is "no reason" why one party, "having determined, as a matter of business judgment, that the price fixed justified assuming the risk of loss, should now be allowed to shift the risk so assumed to [the other party], which had neither agreed to assume it nor been compensated for such assumption." Delta Air Lines, Inc. v. Douglas Aircraft Co., 238 Cal.App.2d 95, 47 Cal.Rptr. 518, 524 (1965); see also Philippine Airlines, Inc. v. McDonnell Douglas Corp. 87 Daily J. D.A.R. 613, 615 (1st Dist. Cal.App. Feb. 11, 1987).

[3] The commercial context presented by this case raises equities far different from those of the helpless patient entering the hospital in Tunkl. Arcwel admits that, when it submitted its bid to the Navy, it was aware that it would be have to sign the User's Agreement and was familiar with the terms. Therefore, it had an opportunity to make its bargain based on the entire package

offered by the Navy, including the allocation of various risks associated with the project. If the package as a whole was unacceptable, Arcwel could have declined to bid. Or, it could have increased it bid price to take into account the risk imposed by the exculpatory clause. We find the public interest not seriously implicated by this provision.[2/]

2. Maritime law

[4] If we analyze the contract under maritime law, the exculpatory clause stands on even stronger footing. Clear precedent holds that, "absent evidence of overreaching, clauses limiting liability in ship repair contracts will be enforced." M/V American Queen v. San Diego Marine Const. Corp. 708

2/ Indeed, insofar as the public interest is implicated here at all, it cuts against Arcwel's position. The User's Agreement was part of a package offered by the Navy pursuant to a competitive bid procedure for the award of a public contract. All bidders submitted their proposals based on the terms set forth in the bid documents. To allow the successful bidder to change a key term retroactively would be unfair to the other bidders; such post-hoc renegotiation of the contract's terms could also seriously undermine the government's procurement process.

F.2d 1483, 1488 (9th Cir. 1983), see also Morton v. Zidell Explorations, Inc. 695 F.2d 347, 350 (9th Cir. 1982), cert. denied, 460 U.S. 1039 (1983). We find no evidence of overreaching here.

Conclusion

Whichever law applies, the clause shifting the risk of loss due to negligent maintenance to Arcwel is enforceable, shielding both Arcwel and Southwest from liability. Given the validity of the exculpatory clause, the district court's orders granting summary judgment to Southwest and the Port District were correct.

The magistrate's judgment against Southwest Marine (No. 86-5882) is **REVERSED**; the district court's summary judgment orders appealed by Arcwel Corp. (No. 86-5889) are **AFFIRMED**.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARCWEL MARINE, INC.,	*	Nos. 86-5882
	*	86-5889
Third-party Plaintiff/	*	
Appellee/Cross-Appellant,	*	D.C. No.
	*	CV-83-0342-N(I)
v.	*	
	*	
SOUTHWEST MARINE, INC.,	*	
	*	
Third-party Defendant/	*	**ORDER**
Appellant/Cross-Appellee,	*	
	*	
and	*	
	*	
SAN DIEGO UNIFIED PORT DISTRICT,	*	
	*	
Third-party Defendant/	*	
Cross-Appellee.	*	

Before: **TANG, ALARCON** and **KOZINSKI**, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App.

. 35(b). The petition for rehearing is enied, and the suggestion for a rehearing en anc is rejected.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RCWEL CORPORATION,	)	
	)	CASE NO.
Third-Party Plaintiff,	)	83-0342-(I)
	)	
vs.	)	JUDGMENT
	)	
OUTHWEST MARINE, INC.,	)	
	)	
Third-Party Defendant.	)	
	)	

This action came on for trial before the ourt, United States Magistrate Edward A. nfante Presiding, and the issues having been uly tried and a decision having been ren- ered,

IT IS ADJUDGED that third-party plain- iff Arcwel Corporation recover from third- arty defendant Southwest Marine, Inc. the um of $464,705.48 together with costs of ction.

ATED: April 15, 1986

/b/ Edward A. Infante
EDWARD A. INFANTE
UNITED STATES MAGISTRATE

opy to:
ll Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ARCWEL CORPORATION, Third-Party Plaintiff, vs. SOUTHWEST MARINE, INC., Third-Party Defendant.	)	Civil No. 83-0342-(I) FINDINGS OF FACT AND CONCLUSION OF LAW

The trial of third-party plaintiff, Arcwel Corp. ("Arcwel"), for damages against third-party defendant, Southwest Marine, Inc. ("SWM"), came on regularly for trial without a jury on April 15, 1985, in Courtroom A of the above-entitled court before United States Magistrate Edward A. Infante sitting by stipulation as the trial judge pursuant to 28 U.S.C. §636(c).

Arcwel was represented by Peter J. Ippolito and Oscar Irwin of Hillyer & Irwin. SWM was represented by C. Douglas Alford and Daniel B. MacLeod of Alford & MacLeod.

This Court having received evidence both oral and documentary and heard arguments of counsel the matter was taken under submission. Having considered the same and being fully advised in the premises, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Arcwel is a California corporation engaged in the ship repair and overhaul business with its principal place of business in San Diego, California.

2. SWM is a California corporation engaged in the ship repair and overhaul business with its principal place of business in San Diego, California.

3. On July 8, 1982, Arcwel was awarded a fixed price Master Ship Repair Contract by the United States Navy for the overhaul of the USS DUBUQUE for the sum of $8,169,868. Both Arcwel and SWM are certified by the Navy to overhaul Navy vessels. SWM, along with other local bidders submitted a bid to over-

haul the USS DUBUQUE. During the bidding process for the USS DUBUQUE, SWM, as the dry dock operator, published information to all prospective bidders regarding the estimated amount that it would cost the low bidder to dry dock the USS DUBUQUE for one (1) haul day and thirty-nine (39) lay days, as well as the estimated cost of other dry dock services.

4. The Navy awarded the contract to Arcwel after determining that Arcwel was the lowest qualified bidder to perform the overhaul work. Prior to accepting Arcwel's bid, the Navy asked Arcwel for verification for the accuracy of its bid. In response to the Navy's request, Arcwel verified the amount of its bid. Arcwel's original bid for the entire job was a firm fixed price of $8,169,780.

5. The Invitation for Bid issued by the Navy in conjunction with this bid required the overhaul to take place at the Naval Station Graving Dock, San Diego, California.

The graving dock is a fixed stationary dry dock owned by the Navy.

6. From July 3, 1976, to February 28, 1983, the dry dock facility with specifically identified equipment and realty was leased by the Navy to the San Diego Unified Port District ("Port District") under a written lease.

7. After the Port District was granted a lease by the Navy to operate the dry dock facility, the Port District contracted with SWM on or about September 22, 1981, to operate and maintain the dry dock facility. The Operation and Maintenance Agreement was in effect during the period of the dry dock evolution for the USS DUBUQUE. SWM, as operator of the dry dock, was initially notified that the dry docking of the USS DUBUQUE was scheduled for October 12, 1983.

8. Arcwel, as the successful low bidder for the overhaul, was required to execute a User's Agreement with the Port District that established the obligations of the parties

with regard to the use of the dry dock facility by Arcwel for the overhaul. This agreement was a standard form contract containing exculpatory provisions that Arcwel was required to sign as a condition precedent to performing the overhaul. Thus, Arcwel was not in a position to negotiate any of the terms or conditions contained in the User's Agreement but was required to accept the Agreement without change. Arcwel was compelled to accept the User's Agreement as a whole or reject it in its entirety. The exculpatory provisions contained in the User's Agreement is in a land-based contract, not a contract for ship repair.

9. Initially, Arcwel was obligated to pay $305,893 to the Port District as the dry dock user fee. As a result of the extended period that the USS DUBUQUE remained in dry dock, the dry dock user fee increased an additional $167,000.

10. The leases and agreements, when read together, establish SWM's independent

obligation as the operator of the dry dock facility to maintain the leased property in accordance with sound industrial practice and to keep the facility, including the gantry cranes, in good working order so as to assure the full availability and usefulness of the facility at all times. SWM was required to perform the normal maintenance program in a timely manner pursuant to the terms of the agreement.

11. Gantry cranes Nos. 4 and 8 are included in Exhibit IV, Normal Maintenance Program, and made part of the Operation and Maintenance Agreement. One gantry crane at the dry dock (the Meyerstein or No. 4) was specifically included in the lease between the Navy and the Port District. The second gantry crane located at the dry dock (the Wellman or No. 8) was at all times relevant to this action the sole property of the Navy. The Wellman is functionally identical to the Meyerstein except that it has a slightly greater lifting capacity.

12. Prior to Arcwel's entry into the User's Agreement with the Port District for repair of the USS DUBUQUE, SWM had executed a User's Agreement with the Port District to use the dry dock to repair the USS OKINAWA. SWM's User's Agreement with the Port District required SWM to leave the dry dock in as good a condition as when they first occupied it. They did not.

13. SWM was first advised by the Navy and/or Arcwel at a docking conference on September 30, 1982, that the beginning of the dry dock period was being advanced from October 12, 1982, to October 5, 1982. The Navy's acceleration of the USS DUBUQUE dry dock evolution cut the amount of time available between the undocking of the USS OKINAWA and the docking of the USS DUBUQUE. The USS DUBUQUE entered the stationary dry dock on October 5, 1982, and was undocked on December 5, 1982.

14. When SWM turned over the dry dock facility to Arcwel on October 5, 1982, the

facility was in deplorable condition. The dry dock was Cluttered with trash and litter and had not been properly cleaned in the base of the dock or its surrounding area as required by their written agreement with the Port District.

15. SWM failed to properly maintain the gantry cranes in good working condition despite its ability to repair them. On May 10, 1982, SWM identified to the Port District a major problem in the Wellman crane and requested authorization to have repairs made. SWM repeated its request for authorization to make repairs to the Wellman crane on July 26, 1982, and advised the Port District that repairs were necessary at a cost of approximately $1,000. Both SWM and the Port District knew the Wellman crane had mechanical problems about five months before the USS DUBUQUE was to be dry docked.

16. Pursuant to the Operation and Maintenance Agreement, SWM was authorized to expend up to $90,000 per fiscal year for

maintenance, protection, and repair of the dry dock facility without prior approval from the Port District. SWM did not need prior written consent for emergency repairs. The Wellman crane had been previously repaired, and the Port District was billed for those repairs.

17. Prior to the docking of the USS DUBUQUE, Arcwel had been advised that the Myerstein gantry crane would be available for use. However, on or about October 4, 1982, Arcwel discovered that the Myerstein was inoperable in that it would travel on the track without being bump started and towed or pushed with a forklift. It was hazardous and contrary to sound industrial practice to use a gantry crane in such a manner. The Myerstein was unavailable to Arcwel from October 5 through November 5, 1982.

18. The Wellman gantry crane which was located on the spur track had been inoperable since May of 1982. Repairs were commenced on or about October 5, 1982. On October 12,

1982, it was made available to Arcwel. However, it was in deplorable condition and could not be operated efficiently. The engine leaked water necessitating extraordinary efforts by Arcwel to keep it operable. The fuel lines leaked. The electrical system was faulty with lollypop sticks propped in the circuit breakers. Arcwel experienced daily breakdowns and problems with the Wellman crane.

19. The unavailability of the gantry cranes during the dry docking of the USS DUBUQUE was the result of the failure of SWM to properly carry out the scheduled maintenance required by the Operation and Maintenance Agreement as specified in Exhibit A-51. SWM failed to maintain the gantry cranes in accordance with sound industrial practice as to assure their availability to drydock users.

20. As a result of the unavailability of operable gantry cranes, Arcwel rented land-based mobile cranes. They were supplied

by Superior Crane & Rigging Co. ("Superior Crane") during the drydock evolution of the USS DUBUQUE without obtaining competitive bids from other mobile cranes. Arcwel and Superior Crane have common ownership to some degree; however, it is not unusual for ship repair contractors to have an ownership interest in crane and rigging companies. Arcwel acted reasonably in continuing to lease cranes from Superior Crane because both cranes were unavailable, unreliable, and unsafe. Arcwel had no property interest or ownership whatsoever in the dry dock or any of its equipment.

21. Land-based cranes cannot perform the dry dock evolution as efficiently as the granty cranes; land-based cranes do not have the capacity of gantry cranes and require additional labor to operate.

22. No gantry cranes were available at all during the most critical phase of the dry dock evolution. The unavailability of the Wellman and Meyerstein cranes in good working

condition caused substantial delays in laying the blocks in the dry dock; removing ship parts for overhaul; sandblasting by subcontractor, Sipco Marine, Inc.; and performing other functions in the dry dock evolution. This caused labor inefficiency and excessive overtime and double time costs by Arcwel. The government-approved billing rate established in July of 1982 for the overhaul of Navy vessels was $29.52 per hour.

23. The unavailability of both gantry cranes caused Arcwel to sustain damages in the nature of rental costs, labor inefficiency and labor overtime expenses. Damages flowing from the disruption of the overhaul of the USS DUBUQUE are difficult to calculate. Arcwel need only show its damages with reasonable certainty, and SWM must bear the risk of uncertainty created by its wrong. Plaintiff's expert Ralph Clements, has used a reasonable method of assessing and calculating damages proximately caused by the unavailability of gantry cranes. Mr.

Clements' calculations take into account overruns caused by other factors.

24. The total damage to Arcwel for the rental of additional cranes caused by the unavailability of the gantry cranes amounted to $129,683.

25. The total damage to Arcwel for the labor inefficiency caused by the unavailability of the gantry cranes amount to $335,022.48 ($11,349 overrun hours x $29.52 billing rate).

26. Although Arcwel expended labor costs for overtime during the dry dock evolution, it is not possible from the evidence to determine what portion of the overtime costs, if any, were caused by the unavailability of the gantry cranes. Other problems which occurred during dry docking, unassociated with the cranes, caused disruption delays, thereby impacting on overtime costs. Moreover, the evidence fails to establish that overtime costs incurred were excessive beyond normal expectations. Arcwel's damage expert,

Mr. Clements, made assumptions in Schedule D of his report (Exhibit A-49) which are unsupported by an evidentiary basis. Consequential damages for "excessive" overtime costs have not been established as the proximate result of the unavailability of the gantry cranes.

27. All findings stipulated to as contained in the Amended Pretrial Order of March 18, 1985, are hereby adopted.

CONCLUSIONS OF LAW

1. The Court has ancillary jurisdiction over this case based on the diversity jurisdiction of the original complaint, Sipco v. Arcwel, pursuant to 28 U.S.C. §1332(a)(1). The original action was between citizens of different states, and the amount in controversy exceeded $10,000 exclusive of interest and costs.

2. California law governs the validity and interpretation of the October 1, 1982, User's Agreement between Arcwel Corporation and the Port District and the September 22,

1981, Operation and Maintenance Agreement between the Port District and SWM.

3. California law governs the validity and interpretation of the July 3, 1976, lease agreement and all supplemental agreements between the United States of America and the Port District.

4. California law governs the exculpatory provision contained in the User's Agreement, page 3, paragraph 5.

5. A stationary dry dock is not a vessel for purposes of admiralty jurisdiction.

6. Overhauling a ship is not a traditional maritime activity.

7. A tort occurring on a stationary dry dock does not invoke admiralty law.

8. Arcwel's claim is not a maritime tort barred under admiralty law.

9. California law, not admiralty law, governs this tort action for negligence.

10. SWM owed a legal duty to Arcwel, as a user of the dry dock, to properly maintain and repair the gantry cranes known as the

Meyerstein and Wellman pursuant to the Operation and Maintenance Agreement between SWM and the Port District and in accordance with sound industrial practice.

11. Arcwel was entitled to the use of both gantry cranes in its dry docking operation.

12. SWM was obligated to supply or arrange for the supplying of required equipment by others when equipment was needed that was not provided as part of the dry dock.

13. Even though there was no privity of contract between Arcwel and SWM regarding the use of the dry dock, SWM, as operator of the dry dock, owed a legal duty to Arcwel under the doctrine of J'Aire Corp. v. Gregory, 24 Cal.3d 799 (1979). The Operation and Maintenance Agreement between the Port District and SWM was clearly in tended affect future dry dock users. The harm to a dry dock user in the overhaul of a ship occasioned by the unavailability of inoperable gantry cranes was clearly foreseeable. The connection

between SWM's conduct and the injuries suffered by Arcwel is established with a high degree of certainty. SWM, as the exclusive operator of the dry dock and as a direct competitor with Arcwel, was morally responsible in preventing harm to Arcwel. J'Aire Corp. v. Gregory, supra; and Biakanja v. Irving, 49 Cal.2d 647 (1958).

14. The duty of care owed by SWM to Arcwel is measured by SWM's obligations under the Operation and Maintenance Agreement. The Operation and Maintenance Agreement is of significance to this action only in creating a legal duty in tort.

15. SWM breached its duty to Arcwel by failing to properly maintain the Meyerstein and Wellman gantry cranes and keep them in proper working order for dry dock users.

16. Breach of duty by SWM caused damage to Arcwel in that but for the breach, Arcwel would not have incurred substitute crane rental costs and labor inefficiency damages.

17. SWM's conduct is a material element and substantial factor in bringing about harm to Arcwel and the proximate cause of Arcwel's loss.

18. SWM may not escape liability by attempting to show that other causes may have contributed to Arcwel's damages.

19. SWM was negligent in performing its responsibilities as dry dock operator of the Naval Station dry dock.

20. The validity of the exculpatory provision contained in the User's Agreement is not governed by admiralty law.

21. SWM and the Port District were in superior bargaining positions at the time of contract.

22. Arcwel was bound to perform its work on the USS DUBUQUE in the subject dry dock.

23. SWM and the Port District had a monopolistic grip on the one dry dock in San Diego that Arcwel could use to overhaul the USS DUBUQUE.

24. The exculpatory provision could not be altered through negotiation.

25. The exculpatory clause and its results are unconscionable and were unconscionable at the time of contract.

26. An exculpatory clause in a contract entered into between parties of unequal bargaining power expressed in a standardized contract written by the more powerful bargainer to meet its own needs is invalid where the public interest is affected.

27 The exculpatory provisions contained in the User's Agreement is unenforceable.

28. Arcwel incurred damages proximately caused by the negligence of SWM due to labor inefficiencies from the lack of gantry cranes in the amount of $335,022.48 ($11,349 overrun hours x $29.52 billing rate).

29. Arcwel incurred damages proximately caused by the negligence of SWM due to rental costs of substitute gantry cranes in the amount of $129,683.

30. Arcwel need only show its damages with reasonable certainty, and SWM must bear the risk of uncertainty created by its wrong.

31. Consequential damages for "excessive" overtime costs have not been established as the proximate result of the negligence of SWM.

32. Arcwel is entitled to an award of $464,705.48 ($335,022.48 plus $129,683) plus costs.

DATED: April 15,1986

/s/ Edward A. Infants
EDWARD A. INFANTE
UNITED STATES MAGISTRATE

Copies to:
All Counsel

Appendix B

§ 253. Competition requirements

(a) Procurement through full and open competition; competitive procedures

(1) Except as provided in subsections (b), (c), and (g) of this section and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services--

(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984; and

(B) shall us the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(2) In determining the competitive procedures appropriate under the circumstance, an executive agency--

(A) shall solicit sealed bids if--

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other price-related factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid; and

(B) shall request competitive proposals if sealed bids are not appropriate under clause (A).

(b) Exclusion of particular source; restriction of solicitation to small business concerns

(1) An executive agency may provide for the procurement of property of property or services covered by this section using competitive procedures but excluding a particular

source in order to establish or maintain any alternative source or sources of supply for that property or service if the agency head determines that to do so--

(A) would increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of such property or services;

(B) would be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the property or service in case of a national emergency or industrial mobilization; or

(C) would be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.

(2) An executive agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding other than small business concerns in furtherance of sections 638 and 644 of Title 15.

(3) A contract awarded pursuant to the competitive procedures referred to in paragraphs (1) and (2) shall not be subject to the justification and approval required by subsection (f)(1) of this section.

(c) Use of noncompetitive procedures

An executive agency may use procedures other than competitive procedures only when--

(1) the property or services needed by the executive agency are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency;

(2) the executive agency's need for the property or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the execu-

tive agency is permitted to limit the number of sources from which it solicits bids or proposals;

(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, or (B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center;

(4) the terms of an international agreement or treaty between the United States Government and a foreign government or international organization, or the written directions of a foreign government reimbursing the executive agency for the cost of procurement of the property or services for such government, have the effect of requiring

the use of procedures other than competitive procedures;

(5) a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;

(6) the disclosure of the executive agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or

(7) the head of the executive agency--

(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and

(B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

(d) Property or services deemed available from only one source; nondelegable authority

(1) For the purposes of applying subsection (c)(1) of this section--

(A) in the case of a contract for property or services to be awarded on the basis of acceptance of an unsolicited research proposal, the property or services shall be considered to be available from only one source if the source has submitted an unsolicited research proposal that demonstrates a unique and innovative concept the substance of which is not otherwise available to the United States and does not resemble the substance of a pending competitive procurement; and

(B) in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment when it is likely that award to a source other than the original source would result in (i) substantial duplication of cost to the Government which is not expected to be recovered through competition, or (ii) unacceptable delays in ful-

filling the executive agency's needs, such property may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures.

(2) The authority of the head of an executive agency under subsection (c)(7) of this section may not be delegated.

(e) Offer requests to potential sources

An executive agency using procedures other than competitive procedures to procure property or services by reason of the application of subsection (c)(2) or (c)(6) of this section shall request offers from as many potential sources as is practicable under the circumstances.

(f) Justification for use of noncompetitive procedures

(1) Except as provided in paragraph (2), an executive agency may not award a contract using procedures other than competitive procedures unless--

(A) the contracting officer for the contract justifies the use of such procedures in writing and certifies the accuracy and completeness of the justification;

(B) the justification is approved--

(i) in the case of a contract for an amount exceeding $100,000 (but equal to or less than $1,000,000), by the competition advocate for the procuring activity (without further delegation);

(ii) in the case of contract for an amount exceeding $1,000,000 (but equal to or less than $10,000,000), by the head of the procuring activity or a delegate who, if a member of the armed forces, is a general or flag officer or, if a civilian; is serving in a position in grade GS-16 or above under the General Schedule (or in a comparable or higher position under another schedule); or

(iii) in the case of a contract for an amount exceeding $10,000,000, by the senior procurement executive of the

agency designated pursuant to section 414(3) of this title (without further delegation); and

(C) any required notice has been published with respect to such contract pursuant to section 416 of this title and all bids or proposals received in response to such notice have been considered by such executive agency.

(2) In the case of a procurement permitted by subsection (c)(2) of this section, the justification and approval required by paragraph (1) may be made after the contract is awarded. The justification and approval required by paragraph (1) is not required--

(A) when a statute expressly requires that the procurement be made from a specified source;

(B) when the agency's need is for a brand-name commercial item for authorized resale;

(C) in the case of a procurement permitted by subsection (c)(7) of this section; or

(D) in the case of procurement conducted under (i) the Act of June 25, 1938 (41 U.S.C. 46 et seq.), popularly referred to as the Wagner-O'Day Act, or (ii) section 637(a) of Title 15.

(3) The justification required by paragraph (1)(A) shall include--

(A) a description of the agency's needs;

(B) an identification of the statutory exception from the requirement to use competitive procedures and a demonstration, based on the proposed contractor's qualifications or the nature of the procurement, of the reasons for using that exception;

(C) a determination that the anticipated cost will be fair and reasonable;

(D) a description of the market survey conducted or a statement of the reasons a market survey was not conducted;

(E) a listing of the sources, if any, that expressed in writing an interest in the procurement; and

(F) a statement of the actions, if any, the agency may take to remove or overcome a barrier to competition before a subsequent procurement for such needs.

(4) The justification required by paragraph (1)(A) and any related information shall be made available for inspection by the public consistent with the provisions of section 552 of Title 5.

(5) In no case may an executive agency--

(A) enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions; or

(B) procure property or services from another executive agency unless such other executive agency complies fully with

the requirements of this chapter in its procurement of such property or services.

The restriction set out in clause (B) in addition to, and not in lieu of, any other restriction provided by law.

(g) Simplified procedures for small purchases

(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the regulations modified, in accordance with section 2752 of the Competition in Contracting Act of 1984, shall provide for special simplified procedures for small purchases of property and services.

(2) For the purposes of this chapter, a small purchase is a purchase or contract for an amount which does not exceed $25,000.

(3) A proposed purchase or contract for an amount above $25,000 may not be divided into several purchases or contracts for lesser amounts in order to use the small purchase procedures required by paragraph (1).

(4) In using small purchase procedures, an executive agency shall promote competition to the maximum extent practicable.

§ 2304. Contracts: competition requirements.

(a) (1) Except as provided in subsections (b), (c), and (g) and except in the case of procurement procedures otherwise expressly authorized by statute, the head of an agency in conducting a procurement for property or services--

(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984; and

(B) shall us the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(2) In determining the competitive procedure appropriate under the circumstances, the head of an agency--

(A) shall solicit sealed bids if--

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other price-related factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid; and

(B) shall request competitive proposals if sealed bids are not appropriate under clause (A).

(b) (1) The head of an agency may provide for the procurement of property or services covered by this chapter using competitive procedures but excluding a particular source

in order to establish or maintain an alternative source or sources of supply for that property or service if the head of the agency determines that to do so--

(A) would increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of property or services;

(B) would be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the property or service in case of a national emergency or industrial mobilization; or

(C) would be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.

(2) An executive agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638; 644).

(3) A contract awarded pursuant to the competitive procedures referred to in paragraphs (1) and (2) shall not be subject to the justification and approval required by subsection (f)(1).

(c) The head of an agency may use procedures other than competitive procedures only when--

(1) the property or services needed by the agency are available from only one responsible source and no other type of property or services will satisfy the needs of the agency;

(2) the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is

permitted to limit the number of sources from which it solicits bids or proposals;

(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, or (B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center;

(4) the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;

(5) a statute expressly authorizes or requires that the procurement be made through another agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;

(6) the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or

(7) the head of the agency--

(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and

(B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

(d) (1) For the purposes of applying subsection (c)(1)--

(A) in the case of a contract for property or services to be awarded on the basis of acceptance of an unsolicited

research proposal, the property or services shall be considered to be available from only one source if the source has submitted an unsolicited research proposal that demonstrates a unique and innovative concept the substance of which is not otherwise available to the United States and does not resemble the substance of a pending competitive procurement; and

(B) in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment when it is likely that award to a source other than the original source would result in (i) substantial duplication of cost to the United States which is not expected to be recovered through competition, or (ii) unacceptable delays in fulfilling the agency's needs, such property may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures.

(2) The authority of the head of an agency under subsection ((c)(7) may not be delegated.

(e) The head of an agency using procedures other than competitive procedures to procure property or services by reason of the application of subsection (c)(2) or (c)(6) shall request offers from as many potential sources as is practicable under the circumstances.

(f) (1) Except as provided in paragraph (2), the head of an agency may not award a contract using procedures other than competitive procedures unless -

(A) the contracting officer for the contract justifies the use of such procedures in writing and certifies the accuracy and completeness of the justification;

(B) the justification is approved-

(i) in the case of a contract for an amount exceeding $100,000 (but equal to or less than $1,000,000), by the competition advocate for the procuring activity (without further delegation);

(ii) in the case of a contract for an amount exceeding $1,000,000 (but equal to or less than $10,000,000), by the head of the procuring activity or a delegate who, if a member of the armed forces, is a general or flag officer or, if a civilian, is serving in a position in grade GS-16 or above under the General Schedule (or in a comparable or higher position under another schedule); or

(iii) in the case of a contract for an amount exceeding $10,000,000, by the senior procurement executive of the agency designated pursuant to section 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(3)) (without further delegation); and

(C) any required notice has been published with respect in such contract pursuant to section 18 of the Office of Federal Procurement Policy Act and all bids or proposals received in response to that notice have been considered by the head of the agency.

(2) In the case of a procurement permitted by subsection (c)(2), the justification and approval required by paragraph (1) may be made after the contract is awarded. The justification and approval required by paragraph (1) is not required-

(A) when a statute expressly requires that the procurement be made from a specified source;

(B) when the agency's need is for a brand-name commercial item for authorized resale;

(C) in the case of a procurement permitted by subsection (c)(7); or

(D) in the case of a procurement conducted under (i) the Act of June 25, 1938 (4) U.S.C. 46 et seq.), popularly referred to as the Wagner-O'Day Act, or (ii) section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

(3) The justification required by paragraph (1)(A) shall include-

(A) a description of the agency's needs;

(B) an identification of the statutory exception from the requirement to use competitive procedures and a demonstration, based on the proposed contractor's qualifications or the nature of the procurement of the reasons for using that exception;

(C) a determination that the anticipated cost will be fair and reasonable;

(D) a description of the market survey conducted or a statement of the reasons a market survey was not conducted;

(E) a listing of the sources, if any, that expressed in writing an interest in the procurement; and

(F) a statement of the actions, if any, the agency may take to remove or overcome any barrier to competition before a subsequent procurement for such needs.

(4) The justification required by paragraph (1)(A) and any related information shall be made available for inspection by the public consistent with the provisions of section 552 of a title 5.

(5) In no case may the head of an agency-

(A) enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions; or

(B) procure property or services from another agency unless such other agency complies fully with the requirements of this chapter in its procurement of such property or services.

The restriction contained in clause (B) is in addition to, and not in lieu of, any other restriction provided by law.

(g) (1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the regulations modified in accordance with section 2752 of the Competition in Contracting Act of 1984 shall provide for

special simplified procedures for small purchases of property and services.

(2) For the purposes of this chapter, a small purchase is a purchase or contract for an amount which does not exceed $25,000.

(3) A proposed purchase or contract for an amount above $25,000 may not be divided into several purchases or contracts for lesser amounts in order to use the small purchase procedures required by paragraph (1).

(4) In using small purchase procedures, the head of an agency shall promote competition to the maximum extent practicable.

(h) For the purposes of the following laws, purchase or contracts awarded after using procedures other than sealed-bid procedures shall be treated as if they were made with sealed bid procedures:

(1) The Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," approved June 30,

1936 (commonly referred to as the "Walsh-Healey Act") (41 U.S.C. 35-45).

(2) The Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes," approved March 3, 1931 (commonly referred to as the "Davis-Bacon Act" (40 U.S.C. 276a-276a-5).

(i) (1) The Secretary of Defense shall prescribe by regulation the manner in which the Department of Defense negotiates prices for supplies to be obtained through the use of procedures other than competitive procedures, as defined in section 2303(2) of this title.

(2) The regulations required by paragraph (1) shall-

(A) specify the incurred overhead a contractor may appropriately allocate to supplies referred to in that paragraph; and

(B) require the contractor to identify those supplies which it did not

manufacture or to which it did not contribute significant value.

(3) Such regulations shall not apply to an item of supply included in a contract or subcontract for which the price is based on established catalog or market prices of commercial items sold in substantial quantities to the general public.

§ 45.102. Policy.

Contractors are ordinarily required to furnish all property necessary to perform Government contracts. However, if contractors possess Government property, agencies shall-

(a) Eliminate to the maximum practical extent any competitive advantage that might arise from using such property;

(b) Require contractors to use Government property to the maximum practical extent in performing Government contracts;

(c) Permit the property to be used only when authorized;

(d) Charge appropriate rentals when the property is authorized for use on other than a rent-free basis;

(e) Require contractors to be responsible and accountable for, and keep the Government's official records of Government property in their possession or control (but see 45.105);

(f) Require contractors to review and provide justification for retaining Government property not currently in use; and

(g) Ensure maximum practical reutilization of contractor inventory (see 45.601) within the Government.

§ 45.308. Providing Government production and research property "as is."

(a) The contracting officer may provide Government production and research property on an "as is" basis for performing fixed-price, time-and-material, and labor-hour contracts. It may also be furnished under a facilities contract, in which case the contract shall state that the contractor will

not be reimbursed for transporting, installing, modifying, repairing, or otherwise making the property ready for use.

(b) When the property is provided under other than a facilities contract, the solicitation shall state that-

(1) Offerors may inspect the property before submitting offers and the conditions under which it may be inspected;

(2) The property is offered in its current condition, f.o.b. present location (provide specific locations);

(3) Offerors must satisfy themselves the property is suitable for their use;

(4) The successful offeror shall bear the cost of transporting, installing, modifying, repairing, or otherwise making the property suitable for use; and

(5) Evaluations will be made in accordance with Subpart 45.2 to eliminate any competitive advantage resulting from using the property.

§ 52.245-19. Government Property Furnished "As Is."

As prescribed in 45.305(c), insert the following clause in solicitations and contracts when a contract other than a consolidated facilities contract, a facilities acquisition contract, or a facilities use contract is contemplated and Government production and research property is to be furnished "as is." (See 45.106 for additional clauses that may be required);

GOVERNMENT PROPERTY FURNISHED

"AS IS" (APR 1984)

(a) The Government makes no warranty whatsoever with respect to Government property furnished "as is," except that the property is in the same condition when placed at the f.o.b. point specified in the solidification as when inspected by the Contractor pursuant to the solicitation or, if not inspected by the Contractor, as when last available for inspection under the solicitation.

(b) The Contractor may repair any property made available on an "as is" basis. Such repair will be at the Contractor's expense except as otherwise provided in this clause. Such property may be modified at the Contractor's expense, but only with the written permission of the Contracting Officer. Any repair or modification of property furnished "as is" shall not affect the title of the Government.

(c) If there is any change in the condition of Government property furnished "as is" from the time inspected or last available for inspection under the solicitation to the time placed on board at the location specified in the solicitation, and such change will adversely affect the Contractor, the Contractor shall, upon receipt of the property, notify the Contracting Officer detailing the facts and, as directed by the Contracting Officer, either (1) return such property at the Government's expense or otherwise dispose of the property or (2)

effect repairs to return the property to its condition when inspected under the solicitation or, if not inspected, last available for inspection, under the solicitation. After completing the directed action and upon written request of the Contractor, the Contracting Officer shall equitably adjust any contractual provisions affected by the return, disposition, or repair in accordance with the procedures provided for in the Changes clause of this contract. The foregoing provisions for adjustment are the exclusive remedy available to the Contractor, and the Government shall not be otherwise liable for any delivery of Government property furnished "as is" in a condition other than that in which it was originally offered.

(d) Except as otherwise provided in this clause, Government property furnished "as is" shall be governed by the Government Property clause of this contract.

Supreme Court, U.S.
FILED
DEC 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-755

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

ARCWEL CORPORATION,
Petitioner

versus

SOUTHWEST MARINE, INC., and
SAN DIEGO UNIFIED PORT DISTRICT,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE
NINTH CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

C. DOUGLAS ALFORD
ALFORD & MacLEOD
701 B STREET, SUITE 1625
SAN DIEGO, CALIFORNIA
(619) 234-7000

COUNSEL FOR RESPONDENTS

42pp

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701 B STREET, SUITE 1625
SAN DIEGO, CALIFORNIA
(619) 234-7000

COUNSEL FOR RESPONDENTS

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ARCWEL CORPORATION,
Petitioner

versus

SOUTHWEST MARINE, INC., and
SAN DIEGO UNIFIED PORT DISTRICT,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Southwest Marine, Inc., and San Diego Unified Port District respectfully pray that the petition for writ of certiorari of petitioner Arcwel Corporation be denied for the reasons set forth below.

STATEMENT OF THE CASE

NATURE OF THE CASE:

This case arises out of the use of a dry dock located in San Diego Harbor ("the dry dock") for the overhaul of a United States Navy vessel. The petitioner, Arcwel Corporation, was the company conducting the overhaul under a contract with the Navy. The federal government had leased the dry dock to respondent San Diego Unified Port District in order that the Port District might administer its operation and, thus, possibly make it more available for use by nongovernmental entities. The Port District contracted with respondent Southwest Marine, Inc., to act as the operator of the dry dock. However, petitioner directly contracted with the Port District for the use of the dry dock for the ship overhaul. In this action

petitioner seeks money damages allegedly flowing from delays and disruptions during the performance of its ship overhaul contract caused by the poor mechanical condition of two large gantry cranes located at the dry dock. While denying the essential elements of petitioner's claim, the Port District and Southwest also rely on petitioner's contract promise to hold them harmless from such losses.

PROCEDURAL HISTORY:

The main action, which has been settled and is not involved in the appeal, was filed against petitioner by Sipco Marine, one of petitioner's subcontractors for the ship repair. (CR 1) Petitioner filed separate third-party complaints against the Port District and against Southwest for "Indemnity, Breach

of Third-Party Beneficiary Contract And Negligence". (CR 16, 30, 31; 26, 34)

After the third-party actions were at issue, the Port District and Southwest filed joint motions for summary judgment on December 20, 1983. (CR 42) Upon hearing the motions, the Hon. Leland C. Nielsen entered separate orders in each third-party action on February 3, 1984. In the action against the Port District, the court granted the motion as to all claims. (CR 46) In the action against Southwest, the court granted the motion as to count two (third-party beneficiary's action for breach of contract) and count three (action for indemnity related to main action against petitioner); the motion was denied as to count one (negligence action for damages caused by condition of dry dock). (CR 48)

Petitioner followed with separate motions to revise the court's orders on the motions for summary judgment (CR 49-54); both motions were denied. (CR 62, 63)

After petitioner and Southwest filed a consent to proceed before a United States Magistrate (CR 145), Judge Nielsen ordered the severance of petitioner's third-party action against Southwest and the conduct of all further proceedings therein before a magistrate. (CR 147)

The trial of the third-party action against Southwest came on for trial before Magistrate Edward Infante, sitting without a jury, on April 15, 1985. After eight trial days, the court took the matter under submission. Approximately one year later, on April 15, 1986, the magistrate filed his findings of fact and conclusions of law. (CR 161) A judgment

that petitioner recover $464,705.48 and costs against Southwest was entered on April 17, 1986. (CR 162)

Meanwhile, in the main action, to which the unsevered third-party action against the Port District remained attached, on January 31, 1985, Magistrate Harry R. McCue found the terms of a settlement between Sipco Marine and petitioner to be reasonable and in good faith. (CR 148) Judge Nielsen then ordered that the "portion of the case retained by Judge Nielsen" was settled and continued the matter to May 6, 1985, for filing the settlement. (CR 149) On that date, the matter was continued again to January 13, 1986. No further proceedings to terminate the portion of the case retained by Judge Nielsen were taken until the filing of the "Stipulation For Entry Of Dismissal Of

Complaint And For Entry Of Judgment In Third Party Action Against Third Party Defendant San Diego Unified Port District; Order Thereon" on October 22, 1986. (CR 185) The entry of judgment in the third party action against the Port District was also accomplished on October 26, 1986. (CR 186)

FACTUAL HISTORY:

Petitioner Arcwel and respondent Southwest are corporations engaged in the ship repair business in San Diego. The United States Navy solicited bids for the overhaul of the U.S.S. Dubuque, and both companies, as well as others, submitted bids. On July 8, 1982, the Navy awarded the contract to petitioner at the fixed price of $8,169,868. (Findings 1-3)[1] One

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1. The trial court's individual Findings of Fact (CR 161, pp. 3-7) will be cited as "Finding __"; the trial court's Conclusions of Law (CR 161, pp. 9-13) will be cited as

of the Navy's contract requirements, which petitioner took into account in making its bid, was the requirement that out-of-the-water repairs required during the overhaul be performed in a dry dock known as the Naval Station Graving Dock, San Diego, California. (Finding 5) Petitioner had used the dry dock in June 1982 for another Navy overhaul and was familiar with the available facilities, including gantry cranes, when it entered into the contract for the overhaul of the Dubuque. (RT 57-58, 70-71)

The dry dock is owned by the United States Government and is a physical part of the United States Naval Station, San Diego. (Stip. 9) The dry dock is located at water's edge on the North shore of San Diego Harbor and is

---

"Conc. of Law __"; the parties' stipulations of fact in the Amended Pretrial Order (CR 151, pp. 3-7) will be cited as "Stip. __".

completely surrounded by the Naval Station facilities. In 1976, the government leased the dry dock to the Port District. (Finding 6; Ex. B:1)[2] There were two large gantry cranes[3] located on rails along the upper rim of the dry dock basin; however, the description of the "leased property", as set forth in Exhibit A to the lease (Ex. B:1, Art. 1, p.2), listed only a "Gantry Crane No. 4, 25 tons capacity".[4] This

---

2. The lease recites on page 1 that, while the dry dock was not excess to the needs of the Department of the Navy, it was not "for the time being, required for public use" and, therefore, the Secretary of the Navy determined it was in the public interest to lease the facility.

3. A gantry crane is one installed on a platform supported by a tower or side frames running on parallel tracks. Cf., Webster's New Collegiate Dictionery (1977) p. 473.

4. The gantry crane listed in the lease was known variously as the "Meyerstein", the "No. 4" and the 25-ton crane. Similarly, the other

was the only reference to any crane in the lease's description of the leased property. (Ex. B:1, p. 25)[5] The parties stipulated that only the No. 4 gantry crane was specifically included in the lease. (Stip. 14)

The lease included the following "disclaimer of warranty":

> The Leased Property is leased to the Lessee on an "as is, where is" basis without warranty of any kind, express or implied. Lessee acknowledges that the Government has made no agreement or promises to alter, improve, adapt or repair the Leased Property

---

gantry crane at the dry dock was known as the "Wellman", the "No. 8" and the 30-ton crane.

5. Although the trial court based its damage computations on the failure of Southwest to maintain both gantry cranes, it inconsistently recognized that the leased facilities, the use of which petitioner gained under its User's Agreement with the Navy, included only the No. 4 crane. (Finding 14)

> or any part thereof during the term hereof.

Ex. B:1, Art. 8, p.9.

In addition, the lease required the Port District to indemnify the government against claims arising out of the Port District's use or possession of the dry dock. (Ex. B:1, Art. 7, p. 9)

The Port District, in turn, entered into an "Operation and Maintenance Agreement" with Southwest[6] in which the company agreed to:

> . . . operate and manage the Dry Dock in a manner following the practices and standards of care normally employed in the operation of similar docks and in accordance with the operating manual of said Dry Dock issued by the Department of the Navy, and as directed by the Government and [Port]

---

6. Hereinafter referred to as "Operations Agreement".

> District. [Emphasis added.]

Ex. B:3, Art. 3, p. 3; Finding 7.

The words "Dry Dock" were defined in the Operations Agreement as the "ship repair facilities covered by the Lease" [Emphasis added]. (Ex. B:3, Art. 1(b)) In a related provision, the agreement provided: "The Lease covers a graving dock and caisson, . . ., a twenty-five (25) ton capacity gantry crane . . . ." [Emphasis added.] (Ex. B:3, Art. 1(a))

Any discretion Southwest might have had to make the dry dock available to companies wishing to use it was strictly circumscribed. The Operations Agreement provided:

> Dry Dock Operator [Southwest] shall make the Dry Dock available to Users in accordance with the District's charges and requirements as set forth in its then current Dry Dock Tariff and the utility charges levied by

> the Government, provided, however, that in all such use, the Government . . . shall determine priority of all such work and control scheduling of use of the Dry Dock consistent with the needs of the Navy's fleet. The Dry Dock shall be operated by Dry Dock Operator in accordance with Article 3 of the Lease. [Emphasis added.]

Ex. B:3, Art. 3, p. 4; see also, Stips. 17 and 19.

The word "Users" was defined in the agreement as: "those companies in the ship repair business which are authorized by the Government and District to use the Dry Dock for shipbuilding, ship repair and ship conversion work." (Ex. B:3, Art. 1(e))

The Operations Agreement also included provisions, similar to those in the Port District's lease, requiring Southwest to indemnify the Port District against claims arising from the operation

of, or any defect in, the dry dock and providing that: "The Dry Dock is made available to Dry Dock Operator and Users on an 'as is, where is' basis without warranty of any kind, express or implied." [Emphasis added.] (Ex. B:3, Arts. 7-8, pp. 9-10)

Pursuant to the procedures established by the lease and the Operations Agreement, petitioner entered into a "User's Agreement" with the Port District for the use of the dry dock during the overhaul of the Dubuque. (Ex. B:15) Included in the User's Agreement was petitioner's agreement that the contract was subject to the terms and conditions of the lease (Id., Art. 20, p. 9) and that petitioner would comply with the terms of the lease. (Id., Art. 6, p. 4-5)

More important, the User's Agreement also incorporated by reference an attached "Dry Dock Tariff". (Id., Art. 1, p.2) The tariff described the dry dock in terms closely similar to those used in the lease and the Operations Agreement.

In stating the terms and conditions of use, the tariff provided:

> 6.2 Disclaimer of Warranty
> Users should understand that the Dry Dock is made available on an "as is, where is" basis without warranty of any kind either expressed or implied. A User using the Dry Dock should make an independent inspection and may not rely upon any representation concerning the condition or state of repair of the Dry Dock or any part hereof including any promise to improve, alter, adopt [sic] or repair the Dry Dock or any part thereof unless such representation is made in writing by the District. [Emphasis added.]

In addition, petitioner promised to indemnify and hold the government, the Port District and Southwest harmless from

claims arising from petitioner's use of the dry dock. (Id., Art. 6.3, pp. 19-20) More specifically, petitioner agreed:

> . . . to release and hold the District, the Government, the Dry Dock Operator [Southwest] . . . harmless from any cost or loss <u>including loss of profit arising from disruption to or delay in User's contract work</u> due to acts or omissions (including negligence) of [such parties] . . . in the operation of the Dry Dock so long as such parties have acted in good faith. [Emphasis added.]

Id., Art. 6.3, pp. 20-21.

Under petitioner's contract with the Navy, the Dubuque was initially to enter the dry dock on October 12, 1982. (Amended Pretrial Order, CR 151, Stip. 33) However, the Navy unexpectedly exercised its prerogative to move the beginning of the dry-docking up to October 5, 1982. Southwest's first notice of this was on September 30, 1982.

(Stip. 28) This appreciably reduced the amount of time which had previously been expected to elapse between the undocking of the previous ship in the dry dock and the docking of the USS Dubuque. (CR 161, Facts Not Contested, No. 1, pp. 7-8)

It was during this shortened period, that Southwest was called on to conduct required repairs, maintenance and cleaning of the dry dock. Despite the unanticipated acceleration of the schedule, Southwest was able to have the dry dock in operable condition on October 5, 1982, when the USS Dubuque came into the dry dock. (Stip. 7)[7] Prior to the docking of the vessel, Navy representatives inspected the dry dock

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7. In stipulation No. 7 of the Amended Pretrial Order the parties stipulated that the dry-docking started on October 4, 1986; this was an inconsequential typographical error.

and approved its condition for flooding and use for the overhaul of the Dubuque. (CR 151, Facts Not Contested No. 2, p. 8) Prior to the docking of the vessel, petitioner's project manager for the overhaul of the Dubuque inspected the dry dock and accepted it for use. (RT 399-400) The vessel left the dry dock on December 5, 1982, after the dry dock phase of the repair work was completed.

At the time of the inspection and acceptance of the dry dock by petitioner's project manager, he was aware that the dry dock gantry cranes were temporarily unavailable for use. (RT 322) The gantry crane which was part of the leased premises, crane No. 4, was made available for use during the last half of the dry dock period.[8] The other

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8. The dry dock period extended from October 5 through December 5, 1982. (Stip. 7) Crane No. 4 became

crane, crane No. 8, was made available one week after the vessel entered the dry dock; however, its utility was limited by its poor mechanical condition. (Finding 18)

The Southwest employee who acted as the Dockmaster testified that the dry dock gantry cranes were approximately 40 years old and required continual repair efforts to keep them as operational as possible. (Deposition of Raymand Claire Alderman, May 29, 1984, p.12-15)[9] The maintenance efforts of the Dockmaster's crew were recorded in daily maintenance logs. (Ex. A:7) Monthly written maintenance reports were made by Southwest to the Port District; these

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available on November 6th. (Finding 17)

9. Admitted into evidence pursuant to stipulation of counsel. (RT 428-430)

included reports of work performed on the gantry cranes. (Exs. A:10, A:30, B:26)

Despite the documented efforts of Southwest to maintain the cranes, the trial court found that Southwest had not complied with its obligations to maintain the gantry cranes under the Operations Agreement between Southwest and the Port District. (Findings 15, 19)

SUMMARY OF ARGUMENT

The Court of Appeal was correct in ruling that the exculpatory provisions in the contract signed by petitioner to obtain the use of the Navy dry dock for petitioner's commercial use were valid and enforceable under both federal maritime law and the law of the state of California.

ARGUMENT

1. THERE IS NO CONFLICT BETWEEN CALIFORNIA LAW AND FEDERAL MARITIME LAW GOVERNING THE ENFORCEABILITY OF EXCULPATORY CLAUSES IN CONTRACTS WHICH DO NOT AFFECT THE PUBLIC INTEREST.

The Court of Appeals decided that the result in this case was the same under either federal maritime law or California law and, therefore, felt no need to choose between the two. Petitioner now argues that this was error; that the case involves an unresolved conflict between the applicable rules in each body of law; and that the California rule set forth in Tunkl v. Regents of the University of California (1963) 60 Cal.2d 92 should be applied to invalidate the exculpatory clauses enforced by the Court of Appeals.

Initially, it should be noted that petitioner's supporting argument includes a not uncommon confusion of maritime law with admiralty jurisdiction. In support of its argument that maritime law does not govern the interpretation of the exculpatory clauses in this case Petitioner discusses at some length the well-known case of Executive Jet Aviation v. Cleveland (1972) 409 U.S. 249. Executive Jet, however, is the preeminent decision on the question of when admiralty jurisdiction attaches and not authority on the question of when maritime law applies. As this court recognized in Kermarec v. Compagnie Generale Transatlantique (1959) 358 U.S. 625, 628, the exercise of admiralty jurisdiction and the application of maritime law do not always go hand-in-hand. As was done in this case, maritime

law may be applied in cases heard by a court exercising diversity jurisdiction.

It also appears that petitioner's confusion carries over into its understanding of the transactions giving rise to this litigation. At page 18 of its petition petitioner states: "Clearly Arcwel's contract with the Navy is subject to maritime law, but its agreement with Southwest does not involve a 'traditional maritime activity,' . . . ." While respondents agree with the first clause of the sentence, they cannot agree with the second because, among other reasons, petitioner had no contract with Southwest relative to the drydocking of the Dubuque. Petitioner's Users Agreement for the use of the dry dock was with the Port District, not with Southwest. (Ex. B:15) The exculpatory clauses with which we are concerned were

in the User's Agreement and in the incorporated Port District tariff. It would be difficult indeed to contemplate a more "traditional marine activity" than petitioner's use of a dry dock for the repair of a sea-going vessel.[10]

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10. It has been long-settled that contracts sufficiently related to the use of ships to make the contracts subject to maritime law include those dealing with the construction, use and operation of dry docks. The Vidal Sala (D.C. Ga. 1882) 12 F. 207; The Robert W. Parsons (1903) 191 U.S. 17; The Steamship Jefferson (1909) 215 U.S. 130; The Atlanta (S.D. Ga. 1948) 82 F.Supp. 218; In re Queen Ltd. (E.D. Pa. 1973) 361 F.Supp. 598; The Alliance (N.D. Cal. 1916) 236 F. 361; Newport News Shipbuilding & Dry Dock Co. v. O'Hearne (4th Cir. 1951) 192 F.2d 968; Brown & Root, Inc., v. Joyner (4th Cir. 1979) 607 F.2d 1087, 1089 ["[A] dry dock is peculiarly a maritime facility."] More specifically, contracts for the use (The Vidal Sala, The Robert W. Parsons, The Atlanta), the construction (Brown & Root) and the repair (Newport News) of dry docks have been held to be matters governed by maritime law.

A. The Decision Of The Court Of Appeals Is Supported By California Law.

Petitioner argues that the decision of the Court of Appeals conflicts with the case of Tunkl v. Regents of the University of California (1963) 60 Cal.2d 92. (Petition For Writ Of Certiorari, pp. 20 et seq.) However, the Court of Appeals considered Tunkl and, in fact, relied on it to reach its decision. A brief review of the case reveals why.

First, Tunkl dealt with the critical situation of a seriously ill person seeking medical care and being required to sign a medical release form as a condition of treatment. The court relied heavily on a determination that the contract involved a matter of serious public interest. The court, on the other hand, noted: "[O]bviously no public

policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party . . . ." (Id.) Petitioner company was certainly not in a situation involving a matter of important public interest similar to that in Tunkl when it entered into the User's Agreement with the Port District for the commercial use of the dry dock with its associated equipment.

Second, all of the damage claimed by petitioner allegedly flowed from the condition of the gantry cranes. The evidence that all of the overhaul work in the dry dock could have been performed by other means, that is, mobile cranes, is uncontradicted. In effect, use of the gantry cranes by petitioner was not a necessity but a practical and economic

convenience. Requiring petitioner to inspect the gantry cranes and to decide whether to use them under the terms of the hold harmless provisions of the dry dock tariff, or, instead, to arrange the use of rental mobile cranes, is hardly the extraction of an unconscionable contractual advantage such as involved in Tunkl.

Third, it is clear that the Port District did not have a "monopoly" over the dry dock. Its use was strictly controlled by the Navy, and only government-approved contractors could use it. The fees charged by the Port District were no more than those charged by the government as lease rental. (Exs. B:1, Supp. Agmt. P00002, pp. 1-2; B:15, Dry Dock Tariff, p. 9)

Under the circumstances, it is difficult to comprehend how it could be

thought to be unconscionable for the Port District to ask users such as petitioner to be responsible for their own losses flowing from their use, for their own convenience, of dry dock equipment, such as the gantry cranes.

Petitioner relies on the decision in Pelletier v. Alameda Yacht Harbor (1986) 185 Cal. App. 3d 1553, 230 Cal. Rptr. 253 as being indicative of California law on this question. In Pelletier an intermediate appellate court, in a rather cursory and aberrant application of Tunkl, held that an exculpatory clause in a dock lease could not be relied upon by the dock operator for protection against liability for negligently exposing a yacht at the facility to damage. However, neither the Pelletier court nor petitioner in its petition took note of the recent decision of the California

Supreme Court which strongly supports decision of the Court of Appeals in this action.

In Fahey v. Gledhill (1983) 33 Cal. 3d 884, 191 Cal. Rptr. 639, the court dealt with the effect of an exculpatory clause in a work order for the haulout, repair and maintenance of a 50-foot power yacht.[11] The court initially considered whether federal or state law should be applied. The court stated:

> [A]dmiralty courts have in numerous cases considered the validity and effect to be given to exculpatory clauses like that before us. Nor does it appear that California's policy against agreements exonerating a party for his own negligence is so overwhelming as to compel disregard of admiralty

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11. Such work, of course, directly corresponds to the drydocking, maintenance and repair of the Navy ship in this action.

> law. Our law recognizes the validity of such agreements in some circumstances. (See Tunkl . . .)
>
> It must be concluded that admiralty law in general governs the validity and interpretation of ship repair contracts, including exculpatory clauses. (Emphasis added.)

Fahey v. Gledhill, 191 Cal. Rptr. at 642.

Thus, the California Supreme Court itself has recognized that the state's laws and policies are not contravened by enforcement of a exculpatory clauses in maritime contracts.

B. The Decision Of The Court Of Appeals Is Supported By Federal Maritime Law.

Petitioner also argues that the decision of the Court of Appeals conflicts with the prior decision of this court in Bisso v. Inland Waterways Corp. (1955) 349 U.S. 85, 75 S.Ct. 629, 99

L.Ed. 911. Again, petitioner is being very selective in its citation of authority. Bisso was a case involving an exculpatory clause in a contract for the towing of an oil barge. The court held the clause was contrary to public policy.

This court later held, in a case dealing with an exculpatory clause in a tariff filed with the Interstate Commerce Commission, that such clauses are not automatically invalid in all towage situations. S.W. Sugar Co. v. River Terminals (1959) 360 U.S. 411, 79 S.Ct. 1210, 3 L.Ed. 2d 1334. The court noted that there was no general congressional policy requiring water carriers to be liable for their negligence in all cases.

And, as noted by the court in Fahey, numerous cases have subsequently limited the application of the holding in Bisso to towage cases:

> The reasoning of Bisso is tied to the history of the towing cases, the nature of the towing business and the public service concept. . . . [I]t has been stated that the Bisso rule is limited to towage cases and that the policy expressed is inapplicable to other situations when there is equal bargaining power. Federal cases have subsequently enforced agreements releasing negligence liability in admiralty cases, not involving towage. [Citations]
>
> . . .
>
> The rationale for permitting a party to disclaim responsibility for his own negligence is that parties to an agreement having substantially equal bargaining power may bargain over which is to bear the risk of loss and set the price accordingly, thus achieving a more rational distribution of the risk than the law would otherwise allow. "The rationale presupposes that the contracting parties have in fact considered the relative

> costs of insuring against negligent design and manufacture and have incorporated their conclusions into the contract." [Citation]

Fahey v. Gledhill, 191 Cal. Rptr. at 645-46.

This is exactly the rationale relied on by the Court of Appeal in this case.

> The commercial context presented by this case raises equities far different from those of the helpless patient entering the hospital in Tunkl. Arcwel admits that, when it submitted its bid to the Navy, it was aware that it would be [sic] have to sign the User's Agreement and was familiar with the terms. Therefore, it had an opportunity to make its bargain based on the entire package offered by the Navy, including the allocation of various risks associated with the project. . . . We find the public interest not seriously implicated by this provision.

Arcwel v. Southwest Marine, Inc., (9th Cir. 1987) 816 F.2d 468, 471.

The Court of Appeals pointed out that, in fact, the public interest contravenes petitioner's position.

> All bidders submitted their proposals based on the terms set forth in the bid documents. To allow the successful bidder [Arcwel] to change a key term [an exculpatory clause] retroactively would be unfair to the other bidders; such post-hoc renegotiation of the contract's terms could also seriously undermine the government's procurement process.

Id. at 7 n. 2.

2. THE DECISION DOES NOT CONFLICT WITH GOVERNMENT PROCUREMENT POLICIES.

It is difficult to completely comprehend petitioner's argument regarding government procurement policies. Apparently petitioner argues that because Southwest was both the operator of the dry dock and one of petitioner's competing bidders on the

Dubuque contract it had an unfair advantage in the bidding process. Petitioner follows with the conclusion that it may avoid the application of the exculpatory clauses in the User's Agreement it signed with the Port District. This appears to be a paradigmatic non sequitur. However it may be classified, the argument goes nowhere. If Southwest had a competitive advantage, it obviously bore no fruit. Petitioner was awarded the bid.

It must also be kept in mind that this is not an action for unfair competition. It is an action against Southwest allegedly arising from its activities as the dry dock operator and not its activities as a ship repair competitor of petitioner. It is an action for the negligent operation of the drydock, that is, for the negligent

maintenance of the dry dock's gantry cranes. That Southwest may or may not have engaged in unfair competitive practices as a ship repair company has no relevance to the question of whether petitioner, in its agreement with the Port District, effectively waived the right to pursue either Southwest or the Port District for any damages that might have flowed from any negligence on the part of Southwest.

CONCLUSION

The interpretation by the Court of Appeals of the exculpatory language in the User's Agreement between the Port District and petitioner is fully supported by maritime case authority in both federal and California courts.

Respondents Southwest Marine, Inc., and San Diego Unified Port District respectfully request the denial of the petition for writ of certiorari.

C. Douglas Alford,
member of the firm of
Alford & MacLeod, Attorney
For Respondents San Diego
Unified Port District and
Southwest Marine, Inc.